

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division


To: Bruce M. Botelho
Attorney General

Date: May 22, 2001

File No: 663-01-0183

Tel. No.: (907) 465-3600

Subject: Computer Video Games
and State Gambling Laws

From: Dean J. Guaneli 
Chief Assistant Attorney General
Department of Law, Criminal Division

You have asked me to analyze whether it is legal under Alaska gambling laws to operate contests in which contestants pay entry fees for a chance to win prizes on electro-mechanical devices commonly called computer video machines. Prizes may be awarded because a player has achieved a set score or based on a comparison with the scores of other players.

The short answer to this question is that paying to play such amusement devices for prizes is illegal gambling.

Introduction

Businesses that sell or operate pay-to-play games are constantly evolving their products, often using the latest computer technology. When existing games are changed or new games developed, manufacturers and distributors frequently contact government officials seeking opinions as to whether the game constitutes gambling. Despite the best efforts of investigators and government attorneys, the advice provided in these situations often leaves questions unanswered and is sometimes imprecise.

It has been the longstanding policy of the Department of Law not to provide legal advice to private persons or businesses, and this is especially important in areas that may implicate criminal laws such as gambling. Nonetheless, because of the growing frequency with which such questions arise, guidance to state investigators is warranted. That is the purpose of this memorandum.

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Under Alaska law, crimes involving gambling depend on the statutory definition of "gambling" in AS 11.66.280. That definition excludes certain business transactions and charitable gaming. With some narrow exceptions (such as playing in a social game in a home), gambling means:

- (1) staking or risking something of value, in other words, paying an entry fee or betting;
- (2) to obtain something of value, in other words, to win a prize;
- (3) based on
 - (a) a game or contest in which the outcome is dependent to a material degree on chance, even if skill is also a factor; or
 - (b) a future contingent event not under the player's control or influence.

Each of these elements is discussed below.

1. Paying to Play

Staking or risking something of value includes any type of bet, entry fee or purchase that is required as a condition of participating in the game or contest, unless there is a feasible alternative method of playing and winning a prize without staking or risking something of value (i.e., a "free way to play"). However, we have previously expressed the opinion that even if there is a free way to play the game, it will nonetheless constitute gambling if, as a practical matter, the alternative method is inconvenient or costly compared to the normal method of participating.¹

Purchases of merchandise or services are not considered staking or risking something of value if the normal price has not been increased as a result of the game or contest, and if there is an ongoing market for the merchandise or service when the game or contest is not operating. See footnote 1.

2. Playing for a Prize

The element of a prize can be satisfied by any number of things that have value. The definition of "something of value" appears in AS 11.66.280, and includes services, entertainment and the privilege of playing the game without charge. The only exception that is recognized in the statutes is when the prize is the right to continue

¹ See 1992 Inf. Op. Att'y Gen. (Sept. 2; 663-93-0004) and 2000 Inf. Op. Att'y Gen. (Oct. 17; 663-00-0212).

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playing on an amusement device, i.e., an immediate right of replay conferred by the device, if the right of replay cannot be exchanged or cancelled. See AS 11.66.280(2)(B).

Although an earlier informal Attorney General's opinion took a different position, we believe that "entertainment value" inherent in playing a game is not dependent on the outcome of the game, and thus does not fit within the concept of a prize under Alaska law. The definition of "something of value" clearly includes "entertainment." AS 11.66.280. But the mere fact that entertainment has value does not mean that it is a prize for winning a contest of chance.

Games are, by definition, pastimes that are usually amusing, enjoyable or entertaining. Entertainment occurs simply by virtue of playing the game, win, lose or draw. Although players no doubt derive more pleasure from winning than from losing, the entertainment value of the game does not necessarily depend on any particular outcome. Indeed, there is entertainment derived even when the player stops before the game is completed.

As previously discussed, gambling under Alaska law requires that the prize be received based on the "outcome" of a contest of chance. AS 11.66.280. Thus, when the only thing that the player derives from the game is its entertainment value (as distinct from winning a free replay), there is no gambling because the entertainment occurs regardless of the outcome. The contrary conclusion expressed in the earlier opinion is hereby expressly overruled.²

As a final point on the concept of prize, and as a guide to investigators, we believe that a prudent enforcement policy would permit contests when the only prize to be awarded for playing a game (even a game of chance) is something that has no exchange value and modest intrinsic value, and is traditionally given to identify the player as a participant or winner, such as a certificate, t-shirt, plaque or trophy.

² This opinion overrules 1995 Inf. Op. Att'y Gen. (Nov. 15; 663-96-0152) to the extent that the 1995 opinion concluded that the entertainment value of games is something of value that brings the game within the definition of "gambling" in AS 11.66.280. We express no view on any other conclusions in the 1995 opinion.

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3. Chance vs. Skill

The final element in determining whether an activity constitutes illegal gambling turns on the concepts of skill and chance. As noted previously, gambling requires a contest of chance³ or a future contingent event.⁴

Old Alaska case law held that illegal gambling occurred "where chance dominates the distribution of prizes even though such a distribution is affected to some degree by the exercise of skill or judgment." *Morrow v. State*, 511 P.2d 127 (Alaska 1973). In other words, the court held that for an activity to be considered gambling, chance must be the dominant factor, even if skill is material.

But in 1978 the Alaska Legislature specifically rejected the court's formulation in *Morrow* and actually reversed the factors so that gambling occurs even if skill is the dominant factor, as long as chance is a material element. Senate Journal Supp. No. 47, at 112-14 (June 12, 1978). The Alaska Legislature adopted the commentary of the New York legislature, in noting that "despite the importance of skill in any game, [gambling occurs if] the outcome depends in a *material degree* upon an element of chance." *Id.*

There seems to be little doubt that computerized games which attempt to reproduce traditional gambling (such as video poker or video slot machines) have chance as the dominant factor in their operation. These games rely on computerized number generators and statistical software to reproduce the randomness of the real games, or to manipulate the odds of a particular outcome occurring. Thus the machine itself controls the outcome, with the player being left with little control over the outcome other than to select the amount of bet and to take or discard cards (as in video poker or blackjack) in an attempt to improve the odds of winning. Therefore, in computer games that involve the turn of a playing card, the roll of the dice, the spin of a wheel, or the drawing of lots, chance is clearly material and predominant, even though skill is obviously involved in calculating the odds of winning. In other devices, however, the element of skill may very well be the predominant factor, but chance may nonetheless still be material.

³ A "contest of chance" is defined in AS 11.66.280(1) to include any game or contest "in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestant may also be a factor."

⁴ "Future contingent event" is not defined, but would include any occurrence that is "not under the person's control or influence." AS 11.66.280(2).

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It ordinarily requires a detailed understanding of the inner-workings of gaming devices and the mathematical algorithms that control them, to determine the precise manner in which the machine operates. These other computer games often use video images to portray car races, baseball games, golf matches or other sporting events, or science fiction or fantasy scenarios involving combat, adventure or manipulation of video images. These computerized devices usually depend on sophisticated software that attempts to visually and aurally entertain the player, and in some cases to represent and display the sense of a real-life event.

Electro-mechanical game devices come in a seemingly unlimited and constantly evolving variety. All have some type of system of player hand and/or foot mechanisms, often a wheel, button, stick or pedal, or a combination of these. In a typical device, the player attempts to achieve a certain score by manipulating the mechanisms. In classic pinball-type machines, the player attempts to directly control moving metal balls. But in video games there is commonly a computer-controlled video screen to *display* movement, rather than actually moving physical objects like balls. The hand and foot mechanisms change the player's movements into electronic signals that are sent to a processing device that interprets the inputs using computer software and translates the inputs onto a visual display.

The typical computer game also calculates a score for the player. The score is usually in points, elapsed time or number of attempts taken. With computer devices, the score awarded to the player is often displayed and compared with the scores of other players. With some modern games, such as the golf game described below, devices in one location can be linked electronically to devices in different locations anywhere in the country, so that scores in multiple locations can be compared.

The particular device that prompted this inquiry is a computer video game based on the game of golf.⁵ Although this golf game is the only video machine discussed in this memorandum, we believe that it provides a good basis for analyzing issues that are common to all types of similar machines. Therefore, the opinions expressed today apply to all types of computer video games.

⁵ The game displays the movement of a golf ball on a selected golf course, based on inputs from the player, who is given several variables and settings to choose from. For example, the player is told the distance to the hole, layout of the fairways and traps, wind speed, course terrain and slope of the green. Using buttons and a "trackball" input, the player can provide direction of "swing," selection of one of 14 "clubs," amount of "back swing," forward club "speed," the "type" of swing (i.e., hook, slice, etc.), club "angle," and whether there is "back spin."

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The attorney for the manufacturer of the golf video game has provided us with a statistical analysis, prepared by a gaming expert retained by the manufacturer, showing that a player can improve his or her score with repeated playing of the device, and that skilled players consistently beat the scores of players of lesser skill. The gaming expert has also submitted a testing report that asserts that a particular selection of inputs consistently causes the same result on the video screen under the same circumstances. The manufacturer thus claims that the outcome of the game is dependent solely on the skill of the player, and is not dependent on chance in any degree.⁶

Although the 1978 revision of the criminal code changed the relative importance of skill and chance in connection with the statutory definition of gambling, earlier Alaska case law is nonetheless relevant in analyzing concepts of skill and chance. In 1965 the Alaska Supreme Court analyzed the elements of skill and chance in a pinball machine. In that game, not unlike a game of golf, the player would try to guide balls to certain holes. The lower court had found, and the supreme court conceded, that skill was important. As the supreme court observed,

To say that a skilled player would have a better opportunity than an unskilled player to win . . . is not the same as saying that the skilled player's operation of the machine will certainly result in a fixed [prize] each time he shoots his quota of balls.

State v. Pinball Machines, 404 P.2d 923, 926 (Alaska 1965). *Accord*, *People v. Turner*, 629 N.Y.S.2d 661 (Crim. Ct. N.Y. 1995) ("The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the skill employed.")

There is little question that a person can improve their score on computer gaming devices with repeated practice. This does not necessarily lead to the conclusion that chance is not material in winning a prize, or that the skill needed to play the game will be recognized as a legitimate factor in exempting the game from state gambling laws.

⁶ The video golf device does introduce a degree of randomness in presenting video "obstacles," such as occasional wildlife and spectators, and changing weather conditions. Such computer-generated factors can, however, be controlled by the manufacturer, and made uniform and consistent for all players. The manufacturer of the golf game asserts that the random changes in course conditions are in fact controlled in situations in which prizes are awarded. Our analysis does not, therefore, turn on the existence of computer-generated changes if such factors are controlled.

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The Alaska Supreme Court in *Morrow v. State* set out four factors for courts to consider to determine whether skill will be recognized as a legitimate factor in a contest. One of these factors (that the winner of the contest must be determined objectively), appears to be met by most video games that calculate points, elapsed time or some other type of objectively-based score. Another *Morrow* factor is whether skill controls each part of the contest. Assuming skill is recognized as a legitimate factor, it appears to be necessary in each phase of playing the golf game, and perhaps other video games. 511 P.2d at 129-30. However, as discussed above, while skill certainly affects the playing of the game, there are other factors that determine whether a participant wins a prize.

As discussed below, two of the *Morrow* factors could lead to a conclusion that some computer video games available to the public are so complex or winning a prize requires such a high level of skill that it is gambling for the average player to pay for the chance to play the game to win a prize.

In *Morrow*, the supreme court said that in a contest in which skill will be held to predominate, participants "must have sufficient data upon which to calculate an informed judgment," presumably about whether they have sufficient skill to enter or to continue playing in the contest. *Id.* at 129. It could be argued that such data for informed consent do not exist in computerized devices governed by complicated internal mechanisms that are inaccessible and essentially unknown to the player and ordinarily completely hidden from him. We believe that it will be extraordinarily difficult if not impossible for a player to gain sufficient knowledge about the software or hardware in a computer gaming device to be able to determine the manner or degree to which randomness or mathematical or statistical patterns affect its operation. In other words, the player has no way of knowing the precise methodology of the mechanism being played. Moreover, informed consent may be lacking if as practical matter the player does not have complete information about other players against whom he is competing.⁷

Another factor noted by the supreme court in *Morrow* is that the general class of participants must possess the necessary skill to be able to win. For example, "[w]here the contest is aimed at the capacity of the general public, the average person must possess the skill . . ." *Id.* Even where there is an attempt to warn the participants that a high level of proficiency and experience is needed to succeed in the contest, that may not be enough. Computer video games are ubiquitous. Nowadays most children

⁷ On the other hand, it could also be argued by the manufacturer of a game that the players have adequate opportunity to practice the game before they enter a contest, and that they can obtain information about the competition if the machine provides a display of the top scores.

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grow up playing many such games, and they are popular pastimes especially among teenagers and young adults. The chance to win large cash prizes by playing one of these computer video machines will be very enticing to many people, regardless of warnings about the level of aptitude needed. In *Morrow*, the supreme court warned that "[t]he scheme cannot be limited or aimed at a specific skill which only a few possess." *Id.* If so, then as a practical matter the average player that may be enticed into entering the contest has little or no opportunity to win, and playing the game may be considered gambling. As the supreme court noted, what is critical is "the capacity of the general public-not experts. . ." *Id.*

Based on the supreme court's discussion of skill in *Morrow*, it is at least open to question whether the skill needed to play the golf machine will be recognized as a legitimate factor. Even if skill is recognized as a legitimate factor, it may not suffice to take the machine outside the ambit of state gambling laws.

In *Morrow* and *Pinball Machines* the supreme court looked carefully at the degree of control that the player could exercise over the outcome of the contest. The legislature has also found that control is an important factor, as is shown in its discussion of the difference between persons playing against each other and persons who merely observe another playing.

The Alaska Legislature made it clear that "Games of pure skill, e.g., chess, will not be considered gambling if the contestants bet against each other." Senate Journal Supp. No. 47, at 112-14 (June 12, 1978). By contrast, although betting between chess players (i.e., those in control of the outcome) is not gambling, betting by onlookers *is* gambling. The reason for this, the legislature determined, was that "from the onlooker's perspective, the outcome depends on 'chance' as he has no control over the outcome." *Id.* The legislature thus recognized that the player's control over the outcome of a contest is a critical element.⁸

⁸ Players of video games are mere onlookers of the games of other players, and thus have diminished control over the outcome. In a game of chess, the participants play *against* each other. In such games, the outcome is solely within the control of the players, because the way in which a person plays chess affects the way the opponent plays, and thus controls the outcome. Although there may be factors outside of the player's control, such as distractions, lighting conditions or other environmental factors, such conditions apply to each of the contestants more or less equally. Importantly, each chess player is not merely a passive onlooker in the other's game. The movements of one player affect and often dictate the movements of the other. In video games, however, the participants may be playing the game *with* each other, but they are not playing *against* each other. For example, in a typical video game, one person plays the game at a time, and the scores obtained by each player are usually not dependent on how well the other

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As previously discussed, computer games are complicated devices, the precise operation of which the player has no significant knowledge. In addition, such devices require periodic maintenance or can be internally or externally adjusted in ways that may affect the outcome of play.⁹ Players are usually unaware of how such maintenance (or lack of maintenance) or adjustments could affect play on any given occasion. Thus, the player lacks significant control over the device that is being played.

In addition, when multiple participants are playing more than one device, and especially when devices are electronically linked in multiple locations, there is uncertainty about the adjustments of the various devices and the comparability of scores. Thus, the player lacks significant knowledge about, and has no control over, the conditions under which opponents are playing.

Moreover, when devices are linked in multiple locations, there is the additional uncertainty about the identity of opponents. Players thus lack significant information upon which to base a decision whether to continue paying to play in a particular contest.

In *Pinball Machines*, the supreme court conceded that a skillful player was more likely to win. However, under the facts described by the court, the player could not control *how much* was won, because that was controlled by the machine. "The element of chance is present, because the outcome--the number of free games that one may win--is not a certain thing." 404 P.2d at 925.

person plays. In other words, each participant is in essence an onlooker while the other person plays. This is particularly true in the golf video game. Although participants can play in a "foursome," when each player takes his or her turn the other players in the foursome may be involved in other activities or simply observing. Each player is thus a mere onlooker while the others play. As the legislature observed, "from the onlooker's perspective, the outcome depends on 'chance' as he has no control over the outcome." As discussed in the remainder of this opinion, however, even in video games that might directly pit one player *against* another player, or in which a player attempts to achieve a set score to win a prize, the outcome of a game may be determined by events or mechanisms over which the player has little or no control.

⁹ According to information provided by the manufacturer of the video golf game, the owners are obligated to report to the manufacturer unspecified "software errors" that can obviously affect the operation of these computer-driven games. The manufacturer also advertises "remote operator controlled game adjustments," in which the owner can "Make equipment adjustments without ever leaving their office." "Machine diagnostics" are also available for "Early detection of equipment problems."

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Despite the fact that skill was important in playing the pinball game, and that a skillful player was more likely to win, the fact that the player could not guarantee the amount of the prize was enough for the court to determine that chance predominated, and that playing the pinball machine was gambling. As the supreme court recognized in *Pinball Machines*, if "there is uncertainty, there is chance." *Id.* at 926 (footnote omitted).

Under *Pinball Machines*, the acknowledged skill needed to play the game did not prevent a finding that chance predominated because it could not be said that "the player's operation of the machine will certainly result" in a prize each time the game was played. 404 P.2d at 926. If skill was not predominant in the pinball machine because it would not result in a prize each time the game was played, then that result seems to apply equally to the golf machine. Arguably, if skill is not predominant, then chance must be at least material. If chance is material, then paying to play for the opportunity to win a prize is gambling.¹⁰

With the golf machine, no player is guaranteed a prize. Indeed, the odds of winning a prize depend on both the player's experience as well as the number and experience of other players who are also competing, perhaps in another city or another state. Although skill is important in a player achieving a high score, the scores achieved by all other players¹⁰ as a result that is completely out of the control of any particular player and not in any way dependent on that player's skill. Thus, although playing the golf machine well is dependent on skill, winning a prize depends on other factors and, indeed, on a material element of chance.

Notwithstanding that the skill of the participants may be the predominant factor in achieving a high score on computer video machines, we are of the opinion that the complex, adjustable or inter-connected nature of these devices, and lack of player control over the outcome, creates a material degree of uncertainty and chance as to whether the player will win a prize, which brings these devices within the ambit of Alaska gambling laws.¹¹

¹⁰ The discussion of skill and chance in this memorandum effectively overrules a 1984 opinion to the extent the opinion suggests that betting by participants in an athletic event is not gambling. 1984 Op. Att'y Gen. (Dec. 4; 366-248-85).

¹¹ The attorney representing the distributor of the video golf game provided a two-page letter from an assistant prosecutor to the police in Maui County in Hawaii, expressing the opinion that the golf video game discussed in this memorandum was not gambling under Hawaii law. The definition of "contest of chance" in Hawaii law is almost identical to Alaska's, but the letter contains no discussion of the history or case law of gambling in Hawaii. There appears to be little other legal authority from other jurisdictions that is directly on point because the laws of

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4. Electronic Games Are Amusement Devices Under Alaska Law

We have concluded that electronic video machines are included under Alaska gambling laws if fees are paid for the chance to win prizes for playing the devices. This conclusion provides consistency in the law, because it treats video games the same as classic amusement devices, such as pinball machines.

A pinball machine is a device that has existed for decades. Through use of a spring-loaded plunger, the player propels metal balls toward a slanting surface with pins, holes, targets and other mechanisms that tally points and move the balls. Through manipulation of button or lever-controlled paddles, the player attempts to achieve a higher score.

Pinball machines allow the player significant control over the initial speed of the ball, and the subsequent movements of the ball. Pinball machines also allow the player to directly observe the actual movement of the ball, as contrasted with an electronically-simulated movement on a computer-controlled video screen. It seems apparent that a pinball player requires at least an equivalent amount of skill as someone

most states are different than Alaska's. For example, earlier this year the Louisiana Attorney General's Office wrote an opinion in which the precise golf video game discussed in this memorandum was declared to be a "gambling device." (Op. No. 00-478, Jan. 21, 2001; 2001 WL 129279(La.A.G.)) However, Louisiana law contains statutory definitions that are different than in Alaska. Over twenty years ago a county court in New York declared several different video games to be games of skill, and therefore not gambling, but did so under a local ordinance that is different than Alaska's in that it required that chance predominate in a game in order to be considered gambling. *WNEK Vending and Amusement Co., Inc. v. City of Buffalo*, 434 N.Y.S.2d 608, 616 (Sup. Ct. 1980) (*partially overruled* 506 N.Y.S.2d 856 (1986)). In Iowa, the legislature last year amended its gambling laws to specifically allow the video golf game discussed in this memorandum. In the packet of materials provided by the attorney for the manufacturer of the golf video game, there are statements in a newsletter from the manufacturer that the Iowa statutory change was due to the efforts of one of their distributors, and that without those efforts the bill would not have passed. The Iowa law now specifically exempts

A video machine golf tournament game which is an interactive bona fide contest. A player operates a video machine golf tournament game with a trackball assembly which acts as the golfer's swing and determines the results of play and tournament scores. A video machine golf tournament game is capable of receiving program and data information from an off-site location. A tournament operator shall prominently display all tournament rules.

Iowa Code 99B.11(2e).

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who plays a video game. Moreover, a pinball player has as much if not more control or influence over the game.

Yet despite the acknowledged skill required to play pinball machines and despite the player's apparent control over the outcome, the Alaska Legislature made it clear that pinball machines are amusement devices that involve illegal gambling if anything of value (other than a free replay conferred by the machine) is awarded to the player. See AS 11.66.280(2)(B) and commentary in Senate Journal Supp. 47, at 112-14 (June 12, 1978). We believe that there is no meaningful way to distinguish pinball machines from their modern counterparts: computer video machines.

Therefore, although the criminal code contains no definition of "amusement device," we believe that the term easily encompasses computer video games. If a player pays a fee to play such a machine, the only prize that can be awarded is a free replay under the terms of AS 11.66.280(2)(B).

Please contact me if you have questions.¹²

¹² In the course of preparing this memorandum, a question arose as to whether, if we are incorrect in concluding that prize-based video games constitute gambling, such activities would require a permit under AS 05.15. In other words, if paying for the chance to win a prize on a video machine is not a "contest of chance" under AS 11.66.280, is it then a "contest of skill" requiring a permit under AS 05.15? Under Alaska gaming laws a "contest of skill" is a contest or game "in which prizes are awarded for the demonstration of human skills in marksmanship, races, and other athletic events." See AS 05.15.690(7). The issue is whether playing certain types of video machines would be considered a "race" or "athletic event," or could involve "marksmanship." (Although the word "marksman" is often associated with shooting, one dictionary definition notes that it especially applies to "a person skillful or practiced in hitting a mark or target." Webster's Ninth New Collegiate Dictionary (1990)). It is beyond the scope of this memorandum to decide these issues.